

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB Nos. 18-0013
and 18-0013A

MIKE WILDER)	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
LONG BEACH CONTAINER TERMINAL)	
)	
and)	
)	DATE ISSUED: 03/12/2019
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	
)	
PORTS AMERICA)	
)	
and)	
)	
PORTS INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	ORDER on
Cross-Respondents)	RECONSIDERATION

Claimant has filed a timely motion for reconsideration of the Board's decision in *Wilder v. Long Beach Container Terminal*, BRB Nos. 18-0013/A (Oct. 30, 2018). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Long Beach Container Terminal responds, opposing claimant's motion. We grant claimant's motion for reconsideration for the sake of clarification, but deny the relief requested.

In his motion, claimant contends the administrative law judge erred by stating that he learned in 2012 from his attorney, Mr. Dupree, that he might have a cumulative work-related trauma to his right knee. Claimant states that this error, previously raised, became relevant and should have been addressed by the Board when it vacated the administrative law judge's timeliness finding on the knee injury claim and remanded the case for further consideration. Claimant thus requests that the Board vacate the administrative law judge's "unsupported finding" that Mr. Dupree explained the concept of cumulative trauma to claimant in March 2012, and instruct the administrative law judge on remand that he must consider that claimant's first discussion with Mr. Dupree occurred shortly before claimant filed his first knee injury claim on November 5, 2014.

Claimant is correct in stating that the administrative law judge referenced hearing testimony about a March 2012 conversation between claimant and Mr. Dupree. Decision and Order at 5. The record establishes that claimant sustained a work-related cumulative traumatic injury to his neck on February 26, 2012, CX 5, Dep. at 5, 10, 72; *see also* LX 11, PX 6, and that "[i]n 2012, claimant filed a claim for a neck injury against [Ports America] based upon cumulative trauma related to his driving UTRs." *Wilder*, slip op. at 2 n.2; *see also* Cl. Br. at 5, 32. Claimant does not dispute either of these statements.

Review of the testimony referenced by the administrative law judge supports his statement that "Mr. Dupree explained the concept of cumulative work-related trauma in relation to his [2012] neck injury."¹ Decision and Order at 5. Indeed, claimant filed a claim for benefits for his cumulative neck injury in 2012 after the conversation claimant had with Mr. Dupree regarding his neck injury. However, contrary to claimant's implication, the administrative law judge, in addressing the date of awareness issue on the knee injury claim focused almost exclusively on the discussion claimant had with Dr. Malekafazli in April 2012.² *Id.* at 8. Thus, claimant's assertion of error is unfounded, and

¹The essence of claimant's testimony is that he first "had an appreciation of the significance of the continuing to work and the trauma and the loss of potential earnings capacity" after he contacted Mr. Dupree "about helping me with my neck situation." HT at 67-68. The two of them had a "conversation about my history, my medical history" and that "soon thereafter" claimant filed his own claim for benefits relating to his 2012 cumulative trauma neck injury. *Id.*

²The administrative law judge found, based on claimant's testimony, that "[o]n April 9, 2012, Dr. Malekafazli explained to Claimant how work activities could cause cumulative trauma; namely that continued use of a body part can contribute to the deterioration of soft tissues and lead to arthritis." Decision and Order at 5. The administrative law judge found that "based on Dr. Malekafazli's [2012] explanation, a reasonable person with Claimant's experience of the relationship between his work

we reject the contention that the administrative law judge erred in stating that claimant learned about cumulative trauma from Mr. Dupree prior to filing his 2012 claim for a work-related cumulative neck injury.

We also reject claimant's request that the Board clarify its declaration that "the finding of prejudice [under Section 12(d)] is affirmed" because it was unchallenged on appeal. The Board's decision satisfactorily explains the prejudice issue in terms of the administrative law judge's findings and the procedural posture of this case. *Wilder*, slip op. at 7 n.7.

activities and his symptoms would have realized that the concept of cumulative trauma relates to the development of arthritis in other body parts, including the knee" as of that date. *Id.* at 8. Thus, the administrative law judge concluded that "[c]laimant was aware or should have been aware of the second element (the relationship between work and the knee problem) and third element (the impact of the knee problem on earning capacity) in April 2012 when Dr. Malekafazli explained how cumulative trauma works." *Id.*

The Board, however, held that "the administrative law judge did not adequately explain his inferences or the conclusions drawn therefrom, in light of the conflicting evidence of record" on the issue of claimant's date of awareness. *Wilder*, slip op. at 7. It thus vacated the administrative law judge's date of awareness finding and remanded the case for further consideration of that issue "in light of all the relevant evidence of record." *Id.*

Accordingly, claimant's motion for reconsideration is denied. 20 C.F.R. §802.409. The Board's prior decision is affirmed, and the case is remanded to the administrative law judge for further consideration consistent with the Board's initial Decision and Order.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge